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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. ~~912~~

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

v.

NEW PROCESS GEAR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 10, 1958.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The New York Central Railroad Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 8, 1957.

Citations to Opinions Below

The opinion and judgment of the United States District Court for the Southern District of New York is unreported and is printed in the record submitted to the Court below at pages 35a-37a.*

* The record submitted by petitioner to the Court of Appeals for the Second Circuit was printed in the form of an appendix. Petitioner will indicate references to that appendix as "R. -a." References to the appendices annexed to the instant petition will be indicated as "Appendix hereto, *infra*, p. ."

The opinion and judgment of the Circuit Court of Appeals is printed in Appendix B hereto, *infra*, pages 29-36, and is reported at 250 F. 2d 569. The memorandum and order of the Circuit Court of Appeals denying petitioner's petition for a rehearing is printed in Appendix D hereto, *infra*, pages 47-9, and is reported at 250 F. 2d 572.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 8, 1957. Appendix B, *infra*, page 35. Rehearing was denied on January 15, 1958. Appendix D, *infra*, page 49. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

(1) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, may the defendant railroad be deprived of its right to fully contest the issues in a trial *de novo* before the court, limited only to the extent that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated?

(2) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, may the court grant judgment if the report and order do not contain the basic findings required by Section 14(1) of the Interstate Commerce Act?

Statutes Involved

The statutory provisions involved are Sections 1(5), 8, and 16(2) of the Interstate Commerce Act [49 U.S.C. Sec-

tions 1(5), 8, and 16(2)], and Sections 5, 7 and 8 of the Administrative Procedure Act [5 U.S.C. Sections 1004, 1006 and 1007]. They are printed in Appendix A, *infra*, pages 23-8.

Statement

This litigation began with the filing of a complaint with the Interstate Commerce Commission by the New Process Gear Corporation against The New York Central Railroad Company on June 8, 1950, in which the rates and charges assessed on carload shipments of iron and steel automobile driving gear parts shipped over the defendant's lines from Syracuse, N. Y., to Detroit, Mich., during the period April 9, 1944, to August 21, 1947, were assailed as unjust and unreasonable, in violation of Sections 1 and 4 of the Interstate Commerce Act. The prayer of the complaint was for an award of damages only (R. 38a-9a). In a report* issued August 8, 1951, the Commission found that the assailed charges were unjust and unreasonable and that the complainant was entitled to reparation, with interest, on the basis of rates found reasonable by it (R. 63a-7a). Petitioner herein filed two petitions seeking the reopening and reconsideration of the report (R. 68a-82a, 84a); both were denied by the Commission (R. 83a, 85a). Thereafter an order was entered awarding reparation to respondent herein in the sum of $6,550.81, with interest at the rate of four per cent from August 2, 1954, on 638 shipments weighing approximately 26,000 pounds or less. Upon the refusal of the petitioner to comply with that order, a suit was instituted in the United States District Court, Southern District of New York, under Section 16(2) of the Interstate Commerce Act.

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* Reported at 281 I.C.C. 701.

Petitioner's answer to respondent's complaint alleged that the report of the Commission was in error as to matters of law and fact; that the findings were not supported by competent evidence and were contrary to the weight of the evidence; that the order of the Commission based on the aforesaid report was invalid as to matters of law, and that the Commission acted arbitrarily in refusing to grant petitioner's petition seeking the reconsideration of the Commission's report and order (R. 7a).

At the trial respondent introduced in evidence certified copies of the report and order of the Interstate Commerce Commission, a statement showing the details of the shipments on which reparation was sought, and rested.

The defendant offered in evidence the pertinent portion of the record before the Interstate Commerce Commission (Ex. A). The defendant also introduced in evidence a statement covering 1,717 additional shipments made by the plaintiff over the defendant's line from Syracuse N. Y., to Detroit, Mich., during the period in which the complainant seeks reparation on only 638 of the total of 2,355 shipments. That statement, which was received in evidence (Ex. B), shows that the 1,717 shipments ranged in weight from 30,038 pounds to 68,830 pounds (R. 23a). A defense witness pointed out that the defendant would have received approximately $26,500 as additional freight charges had the basis on which the Commission awarded reparation on 638 shipments applied on all 2,355 shipments made by the plaintiff during the reparation period (R. 26a, 86a).

The defendant offered additional evidence to prove that the light-loading of each and every car on which reparation is sought resulted in the wasteful use of railroad equipment by this plaintiff during a period of war and national emergency in which the federal government had found it

necessary in the public interest to issue orders designed to regulate the use of railroad equipment in order to accomplish the maximum utilization thereof (R. 14a, 20a, 31a-33a). The defendant's witness testified that, with two exceptions, all 2,366 shipments were transported in cars of substantially the same type, size and capacity (R. 23a). He called attention to numerous instances where the plaintiff had used more cars than necessary to transport its shipments (R. 31a-33a). He pointed out, for example, that the plaintiff seeks reparation on three cars shipped on June 29, 1946, the average weight of which was 24,777 pounds, although on the very same date the plaintiff made five other shipments ranging in weight from 27,147 pounds to 63,830 pounds, with an average weight of 39,566 pounds. The average weight for all eight shipments was 34,020 pounds, or approximately one-half of the 63,830 pounds which was loaded in one of the eight cars. That weight could have been loaded in each and every one of the remaining 2,354 cars (R. 31a-2a).

This testimony was objected to by plaintiff on the ground that the Interstate Commerce Commission has sole jurisdiction to determine the reasonableness of rates, and that the only function of the court is to determine whether or not there was any substantial evidence to support the finding of the Commission (R. 12a, 13a, 14a, 20a, 21a, 22a, 25a, 26a, 33a-34a). The court ruled that it would receive all the evidence subject to the plaintiff's objection and a motion to strike to be made at the conclusion of the case (R. 19a). When plaintiff renewed its motion at the end of the entire case, the court reserved decision (R. 34a).

In the opinion of the trial court the motion to strike was granted upon the authority of *Glens Falls Portland C. Co. v. Delaware & Hudson Co.*, 66 F. (2d) 490, cert. denied 290 U. S. 697 (R. 35a). The court found that there was evidence before the Commission to sustain each of its findings,

including the finding of damage, and granted judgment in favor of the plaintiff (R. 35a).

On appeal, petitioner asked the Circuit Court of Appeals to overrule the *Glens Falls* case and to recognize the right given to defendant in a suit instituted under Section 16(2) of the Interstate Commerce Act, as construed by this Court in *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412. Petitioner also pointed out that in holding that each of the Commission's findings, including the finding of damage, is conclusive and binding upon the court and the parties if supported by evidence, the trial court went even beyond the holding of the *Glens Falls* case, which apparently would limit conclusiveness to the finding dealing with the reasonableness of the rate and not with the fact and amount of damage. The Court of Appeals refused to overrule the *Glens Falls* case, citing as authority for its decision the cases of *Mitchell Coal and Coke Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, and *United States* v. *I.C.C.*, 337 U. S. 426. Appendix B, *infra*, page 34.

Petitioner then petitioned the Court of Appeals for a rehearing on the grounds that it failed completely to understand the rate and tariff situation; that it misconstrued appellant's dissatisfaction with the Commission's decision; and that it overlooked the important fact that, while enforcement of the reparation order would result in affording the shipper with a dual or alternative basis of rates retroactively, the Commission's report contained no finding that respondent was entitled to alternative rates retroactively. Appendix C, *infra*, pages 36-46. The Court of Appeals denied this petition disclaiming any misunderstanding of the rate and tariff situation, and failing to give any significance to the absence of a Commission finding that a dual or alternative basis of rates would have been just and reasonable. Appendix D, *infra*, pages 47-9.

Reasons for Granting the Writ

Confusion and conflict exist in the law pertaining to the right of defendants to have a judicial trial and determination when sued upon reparation orders entered by the Interstate Commerce Commission under Section 16(2) of the Interstate Commerce Act [49 U.S.C. § 16(2)]. Although this court in 1915 construed Section 16(2) as meaning that a carrier has a right to a judicial trial and determination on all the issues, and upheld its constitutionality upon that ground, certain courts of appeals, including the Second Circuit, have disregarded this pronouncement, and have relied upon dictum appearing in an earlier decision of this court which, in effect, states that no such judicial trial and determination can be had.

The interpretation placed upon Section 16(2) by the courts below in the instant case makes Commission reports and orders conclusive rather than *prima facie* evidence of the facts therein stated. It is in conflict with the interpretation of that section by other courts of appeals, and again raises the issue of the constitutionality of that section.

The conflicting interpretations placed on Section 16(2) by the various courts of appeals create uncertainty and confusion as to the applicability of the provisions of the Administrative Procedure Act [5 U.S.C. 1001 *et seq.*] in connection with reparation proceedings.

Other important questions raised by this petition deal with the failure of the Commission to make the basic or quasi-jurisdictional findings, supported by evidence, essential to the validity of its orders, as required by Section 14(1) of the Interstate Commerce Act and the validity of a reparation order which fails to determine damages in the amount of the difference between the aggregate charges paid on all shipments moving within

the reparation period and the aggregate charges which would have accrued on all shipments on the basis found reasonable.

1. The Right of a Defendant to Fully Contest the Issues in a Trial *de novo* Before the Court.

(a) *The Rulings of the Courts Below.*

The Trial Court refused to recognize the right which Section 16(2) of the Interstate Commerce Act expressly reserves to a defendant when sued upon a Commission reparation order; namely, to a full contestation of all the issues, including the reasonableness of the rates and charges lawfully applicable on the shipments on which reparation is sought and the fact and amount of the alleged damages. As authority for such refusal, the Trial Court cited the case of *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co*, (C. A. 2, 1933), 66 F. (2d) 490, cert. denied, 290 U. S. 697 (R. 35a, 36a).

The Court of Appeals affirmed the Trial Court's action, citing as authority therefor the *Glens Falls* case, the case of *Mitchell Coal & Coke Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, and the case of *United States* v. *I.C.C.*, 337 U. S. 426 (Appendix B, *infra*, p. 34).

(b) *The Applicable Law and the Conflict in Decisions.*

Section 16(2) of the Interstate Commerce Act provides that a suit instituted in a district court of the United States to enforce a reparation order of the Interstate Commerce Commission "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated". This provision has been construed in the case of *Meeker & Co.*

v. *Lehigh Valley R.R.*, 236 U. S. 412, as follows:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law." (p. 430)

This construction of Section 16(2) was cited with complete approval in a number of subsequent decisions by this court including *Mills* v. *Lehigh Valley R.R.*, 238 U. S. 473, 482; *Pennsylvania R.R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, 94; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 131; *Pennsylvania R.R. Co.* v. *Weber*, 257 U. S. 85, 90.

The court below disregarded this clear and forceful construction of the statute and placed reliance upon the three cases above noted.

The case of *United States* v. *I.C.C.*, 337 U. S. 426, obviously does not support the proposition that the "scope of review by the district court was whether there was substantial evidence supporting the findings of fact made by the Commission and whether the conclusions of the Commission were in accordance with the standards set by Congress" (Appendix B, *infra*, p. 34). On the contrary, the *Meeker* case was therein cited with complete approval and was relied upon by the court in concluding that shippers may seek judicial review of a Commission order denying reparation. It is stated at page 435:

> "But a Commission award favorable to a shipper is not final or binding upon the railroad. Such an award 'only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. * * * Nor does it in any

wise work a denial of due process of law.' *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430. And see *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 84, 90-91."

The case of *Mitchell Coal & Coke Co.* v. *Penn. R.R. Co.*, 230 U. S. 247, involved the question of whether, in advance of any application to the Interstate Commerce Commission and action thereon by that body, the Circuit Court of the United States had jurisdiction to entertain an action in trespass brought by a shipper of coal and coke to recover damages because of alleged unlawful preferential rates accorded to other and competing shippers. The court did not undertake to interpret Section 16(2), but it did state in what has been termed "elaborate dictum" that:

"Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage —as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing (March 2, 1889, 25 Stat. 855, 859, c. 382)." (p. 258)

The *Glens Falls* case relies upon the dictum of the *Mitchell Coal* case and disregards the *Meeker* case.

The *Meeker* case was decided subsequent to the *Mitchell Coal* case, so that to the extent there may be a conflict the *Meeker* case must be deemed to have reversed the *Mitchell Coal* case. Nevertheless, the Court of Appeals in the instant case disregarded the *Meeker* case and relied upon the *Mitchell Coal* case. The conflict cannot be disputed.

Not only is there a conflict between the decision in the instant case and the decision in the *Meeker* case, but there are conflicting decisions among courts of appeals in the various circuits within the United States.

The following cases hold that the findings of the Commission are *prima facie* only and hence rebuttable, recognizing the right of a defendant to a judicial hearing *de novo*:

Atchison, T. & S. F. Ry. Co. v. *Spiller*, (C.A. 8, 1917), 246 F. 1, reversed on other grounds 253 U.S. 117. See also:

Southern Ry. Co. v. *Eichler* (C.A. 8, 1932), 56 F. (2d) 1010;

Blair v. *Cleveland, C., C. & St. L. Ry. Co.* (D.C., E.D. Ill. 1931), 45 F. (2d) 792; affirmed (C.A. 7, 1932), 59 F. (2d) 478;

Atlantic Coast Line R. Co. v. *Smith Brothers* (C.A. 5, 1933) 63 F. (2d) 747, Cert. denied 289 U.S. 761. See also: *Gabbert* v. *Atchison, T. & S. F. Ry. Co.*, (C.A. 5, 1937) 93 F. (2d) 562.

The following cases hold that the Commission's finding of unreasonableness is conclusive and binding if substantiated by evidence and do not permit the receipt of evidence excepting the record that was before the Commission:

Glens Falls Portland C. Co. v. *Delaware & Hudson Co.*, 66 F. (2d) 490, Cert. denied 290 U.S. 697;

South Carolina Asparagus G. Assn. v. *Southern Ry. Co.* (C.A. 4, 1933) 64 F. (2d) 419, Cert. denied 290 U.S. 647;

Delaware & H. R. Corporation v. *Penn Anthracite Mining Co.* (C.A. 3, 1937) 91 F. (2d) 634, affirming 16 F. Supp. 732; Cert. denied 302 U.S. 756;

El Paso & S. W. R. Co. v. *Phelps-Dodge Mercantile Co.* (C.A. 9, 1935), 75 F. (2d) 873.

In the 5th, 7th and 8th Circuits where the rule appears to be that a Commission finding of unreasonableness is not conclusive and that a judicial retrial and decision is proper, reliance is had upon the language of Section 16(2) as construed by this Court in the *Meeker* case.

In the 2nd, 3rd, 4th and 9th Circuits, where the rule appears to be that a Commission finding of unreasonableness is conclusive if there was evidence before the Commission to support that finding, reliance is placed upon the *Mitchell Coal* case or the *Glens Falls* case.

(c) *The Exemption of Reparation Proceedings From Statutory Provisions Preserving Procedural Rights.*

Where a complete judicial trial and decision is available in connection with an administrative order, there obviously is no need for a requirement that an administrative body be bound closely in respect of the character of the evidence it may receive or the manner in which its hearings may be conducted. Such was the view of this Court in the case of *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, which involved a reparation order of the Interstate Commerce Commission. The Court there stated:

> "* * * And the fact that a reparation order has at most only the effect of *prima facie* evidence (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 434, 439; *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473, 482), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted." (p. 131)

Sections 5, 7 and 8 of the Administrative Procedure Act provide litigants before administrative bodies with

certain procedural safeguards. However, Section 5, which deals with adjudicatory proceedings expressly exempts "any matter subject to a subsequent trial of the law and the facts *de novo* in any court." *The Attorney General's Manual on the Administrative Procedure Act* explains this exemption as follows:

> "* * * This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: 'Where the adjudication is subject to a judicial trial *de novo* (it) is included because whatever judgment the agency makes is effective only in a *prima facie* sense at most and the party aggrieved is entitled to complete judicial retrial and decision.' Sen. Rep. p. 16; H. R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U.S.C. 16) and the Secretary of Agriculture (7 U.S.C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945 (p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:
>
> > This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement." (p. 43)

If an administrative proceeding is exempt from the provisions of Section 5, it would also be exempt from the provisions of Section 7, which applies "in hearings which Section 4 or 5 requires to be conducted pursuant to this section". A proceeding exempted from the provisions of Section 5 would also be exempt from the provisions of Section 8, which applies "in cases in which a hearing is required to be conducted in conformity with Section 7".

If the *Mitchell Coal* case and the *Glens Falls* case are controlling, and no judicial trial and decision is available in connection with the reparation orders of the Interstate Commerce Commission, confusion arises as to the rights of the parties relative to the manner in which a hearing is conducted before the Commission and relative to the character of the evidence the Commission may receive.

In the 5th, 7th and 8th Circuits, where the *Meeker* case controls and the carrier is entitled to a complete judicial retrial and decision, Sections 5, 7, and 8 of the Administrative Procedure Act could not and need not be invoked as forming the basis for a claim that the carrier did not receive a fair hearing before the Commission. On the other hand, in the 2nd, 3rd, 4th and 9th Circuits where the carrier is not permitted a complete judicial trial and decision, it would appear that Sections 5, 7, and 8 of the Administrative Act should be applicable where the carrier is making the claim that it did not receive a fair hearing before the Commission. However, since the exemption in Section 5 was intended by Congress to include reparation orders of the Interstate Commerce Commission because such orders are subject to a complete judicial trial and decision, considerable doubt arises as to whether that section and Sections 7 and 8 of the Administrative Procedure Act could properly be invoked.

The plain language of Section 16(2) and its forceful construction by the Court in the *Meeker* case constitute the justification for the exemption of reparation proceedings from the provisions of the Administrative Procedure Act, and the determination by this Court that it is unnecessary to apply the same procedural safeguards that are necessary where findings and orders are not subject to judicial retrial and decision. The unsoundness of the *Glens Falls* case and the dictum of the *Mitchell Coal* case is apparent.

(d) *The Mitchell Coal and Glens Falls Cases Would Render Section 16(2) Unconstitutional.*

The constitutionality of Section 16(2) was raised in the *Meeker* case. It was there held to be constitutional upon the grounds that this provision only establishes a rebuttable presumption and is at most merely a rule of evidence; that it does not abridge the right of trial by jury or take away any of its incidents; and that it cuts off no defense, permits a full contestation of all the issues, and takes no question of fact from either court or jury.

The dictum of the *Mitchell Coal* case and the doctrine of the *Glens Falls* case are in direct conflict with the reasons stated in the *Meeker* case for upholding the constitutionality of Section 16(2). These cases would make the reports and orders of the Interstate Commerce Commission not "*prima facie* evidence of the facts therein stated," but conclusive evidence, thereby effectually taking away the right of trial by jury and denying a defendant due process of law.

It follows that the action of the courts below in relying upon the *Mitchell Coal* and *Glen Falls* cases in the instant case results in abridging petitioner's right of trial by jury and the incidents of that right, and operates as a denial of due process.

2. The Report and Order does not Contain the Basic Findings Required by Section 14(1) of the Interstate Commerce Act and Therefore Judgment was Improperly Granted.

The complaint before the Interstate Commerce Commission alleged that the complainant made carload shipments of automobile gear driving parts, from Syracuse, N. Y., to Detroit, Mich., and that the rates and charges assessed thereon by the defendant were unjust and unreasonable, in violation of Sections 1 and/or 4 of the Interstate Commerce Act. The prayer of the complaint was that the Commission issue an order awarding damages "by way of

reparation for the unlawful charges collected on shipments during the period from April 9, 1944, to August 21, 1947" (R. 38a).

The Commission's hearing examiner recommended dismissal of the complaint, pointing out that the "complainant in asking for reparation, in effect seeks an alternating rate". He further pointed out that alternative bases of rates are generally undesirable and not in the public interest, citing the case of *Prentiss Wabers Products Co.* v. *Chicago & N. W. Ry Co.*, 219 I.C.C. 473 (R. 62a).

The Commission completely ignored that issue, and made the following finding:

> "We find that the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the corresponding class 40 rates subject to the minimum of 24,000 pounds. We further find that the complainant made the shipments, and paid and bore the charges thereon; that it was damaged thereby, and is entitled to reparation in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable, with interest." (R. 67a)

It made no finding that the failure of the defendant to publish and maintain a multiple basis of rates during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the assessment of unjust and unreasonable rates and charges.

During the reparation period the complainant made a total of 2,355 carload shipments from Syracuse, N. Y. to Detroit, Mich., upon which the assailed rates and charges were lawfully applicable. The effect of the order of the Commission is to award reparation on 638 of those shipments. Had the basis of rates and charges which the Commission finds reasonable for reparation purposes been the lawfully published and legally applicable basis of rates and charges at the time all 2,355 shipments were

made, the complainant would have paid additional freight charges approximating $33,000 on 1,717 of those shipments, or net additional freight charges on the entire 2,355 shipments approximating $26,500.

The Trial Court and the Court of Appeals both recognized that the enforcement of the Commission's order would have the effect of providing respondent with a dual or alternative basis of rates retroactively, but gave no consideration to the important fact that the Commission's report contains no finding that the failure of petitioner to publish and maintain a multiple basis of rates and charges for application on this traffic during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges (R. 37a; Appendix B, *infra*, p. 32).

Historically the Commission has frowned upon prescribing or approving alternative or dual bases of rates. As long ago as 1925, it stated that "It is not our policy or that of carriers to make alternative rates based on different minima." *Lafayette Box Board & Paper Co.* v. *A. C. & Y. Co.*, 101 I.C.C. 273, 274. In 1929 the Commission announced that the refusal to prescribe alternative bases in the *Lafayette* case "should be our guide for the future", inasmuch as such bases "are generally undesirable, in that they are liable to deprive carriers of reasonable carload revenue, result in unjust discrimination by affording different rates on the same commodity, entail wasteful use of equipment, and complicate the rate structure and the process of computing freight charges." *Mathieson Alkali Works* v. *Louisville & N. R. Co.*, 153 I.C.C. 784, 789.

This policy of refusing to prescribe or approve alternative rates, where the factors above mentioned exist, has been maintained by the Commission down through the years without change. *United Clay Products Corp.* v. *Abilene & S. Ry. Co.* (1930), 168 I.C.C. 23; *Traffic Bureau, Chamber of Commerce of Mitchell* v. *Atchison, T. & S. F.*

Ry. Co. (1931), 172 I.C.C. 295; *Eastern Fertilizer Cases* (1934), 198 I.C.C. 483, 495; *Southeastern Vegetable Case* (1934), 200 I.C.C. 273, 287; *Reconstruction Finance Corp.* v. *Akron, C. & Y. Co.* (1952), 287 I.C.C. 353, 359; *Tire Fabric between South and North* (1957), 299 I.C.C. 685, 688.

If the policy adopted by the Commission thirty or more years ago and maintained since without substantial change has any meaning or significance at all, it is obvious that the Commission could not in the instant case justify a finding that an alternative or dual basis of rates would have been just and reasonable and should have been maintained. Whether a departure from this prior and presently existing norm could have been satisfactorily explained away need not be inquired into in view of the failure of the Commission's report to state a finding relative to an alternative basis of rates.

In the absence of an express finding that the failure of petitioner to publish and maintain a multiple basis of rates and charges for application on this traffic during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges, the rates and charges assailed either were just and reasonable as applied to all 2,355 shipments or they were unjust and unreasonable as applied to all 2,355 shipments.

This reasoning is entirely consistent with and inherent in the rule of damages under Section 8 of the Interstate Commerce Act for a violation of Section 1 (5) of said Act, as enunciated in the cases of *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217. Those cases hold that the measure of damages for the charging of an alleged unreasonable rate is the difference between the excessive rate and the rate declared to be just and reasonable by the Commission.

This reasoning was recognized by the Commission itself in *Bigelow-Hartford Carpet Co.* v. *New York, N. H. & H. R. Co.* (1929), 156 I.C.C. 435, 440, wherein it found the complainant damaged "in the amount of the difference between the aggregate charges paid or borne on *all* shipments moving within the statutory period and the aggregate charges which would have accrued upon *all* of said shipments at the bases herein found reasonable." (Emphasis supplied.) To the same effect is the case of *Roanoke Gas Light Co.* v. *Norfolk & W. Ry. Co.*, 191 I.C.C. 173, 176, wherein the Commission stated:

> "Under these circumstances we are of the opinion that the rates and minimum weight of 50,000 pounds herein prescribed should be applied to all the shipments which moved during the statutory period as mentioned herein, and that *the complainants' damage should be found to be the difference between the aggregate charges assessed upon all of said shipments (including those on which charges were assessed at the minimum of 36,000 pounds) and the aggregate charges that would have been assessed at the rates and minimum herein prescribed applied to all the shipments which moved during said statutory period.* This was the method applied in determining damages under similar circumstances in *Bigelow-Hartford Carpet Co.* v. *New York, N. H. & H. R. Co.*, 156 I.C.C. 435, 440." (Emphasis supplied.)

Since the decisions of the Commission in the *Bigelow-Hartford* and *Roanoke Gas* cases, the rule has been and continues to be that reparation will not be awarded where the rate found reasonable, in some instances would result in lower charges than those assessed, but in higher charges in others. The rule is stated in *Stimson* v. *Akron, C. & Y. Ry. Co.*, 262 I.C.C. 418, at page 423:

> "* * * While the findings will result in rates for the future which, in many instances, will be lower than

those now in effect, it is significant that there are many other rates which are lower than those found reasonable. *If we were to award reparation in this proceeding, limiting our findings only to those shipments which have moved at rates higher than those found reasonable for the future and ignoring other shipments which have moved at rates lower than maximum reasonable rates, an anomalous situation would be presented. The effect of this would be to require defendants to pay reparation on one class of shipments, while at the same time denying them the right to recoup the difference between the relatively low rates charged and those found reasonable on other shipments.* Our conclusions might well be otherwise if we were considering the complaints of numerous shippers, all interested in the same class of traffic. Here we have but one shipper. All things considered, we are inclined to the view that an award of the reparation would not be in accordance with substantial justice. Furthermore, in our judgment the rates charged on complainant's shipments, considering the entire adjustment, were not at such a level as would warrant such an award." (Emphasis supplied.)

To the same effect, *H. P. Randall Mfg. Co.* v. *Alton & S. R.*, 273 I.C.C. 745, 747; *Franklin Transformer Mfg. Co.* v. *Baltimore & O. R. Co.*, 278 I.C.C. 349, 354-5; *James B. Clow & Sons, Natl. Works* v. *Louisville & N. R. Co.*, 300 I.C.C. 27, 30.

It is apparent that an award of damages in the instant case would necessarily have to be based upon a finding that the petitioner should have published and maintained a multiple basis of rates and charges for application on this traffic during the reparation period, and that its failure to do so resulted in the application of unjust and unreasonable

rates and charges. No such finding appears in the Commission's report.

In the absence of such a finding, enforcement of the reparation order would result in a circumvention of Section 14 (1) of the Interstate Commerce Act. That section places upon the Commission a "duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." *Alabama Great Southern R. R. Co.* v. *United States*, 340 U. S. 216, 228. Such a finding should be stated "with the simplicity and clearness through which a halting impression ripens into reasonable certitude." *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-11; *Secy. of Agriculture* v. *United States*, 347 U. S. 645, 654.

Enforcement of the reparation order in the absence of such a finding would also be contrary to the provisions of Section 8 of the Interstate Commerce Act. That section makes carriers liable "for the full amount of damages sustained" because of a violation of the provisions of that Act. Certainly, a shipper who paid approximately $26,500 less in aggregate freight charges on all of its shipments than it would have paid had the basis of rates and charges found reasonable been lawfully published and legally applicable throughout the reparation period cannot be said to have suffered any damage within the meaning of this section. As was stated in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 135, a claim for unreasonable freight charges is a claim not for a penalty, but for compensation.

Petitioner respectfully submits that it was error for the Court to grant judgment in the absence of a finding that it was unjust and unreasonable for petitioner to have failed to publish a multiple basis of rates and charges, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. EDGAR MCDONALD,
ROBERT D. BROOKS,
466 Lexington Avenue,
New York 17, N. Y.,
Attorneys for Petitioner.

April 10, 1958.

Appendix A

Pertinent Provisions of the Interstate Commerce Act.

Sec. 1 (5) [49 U.S.C., § 1 (5)]:

All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 8 [49 U.S.C., § 8]:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 16 (2) [49 U.S.C., § 16 (2)]:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any

State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Pertinent Provisions of the Administrative Procedure Act.

Sec. 5 [5 U.S.C., § 1004]:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * * *

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and considera-

tion of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * * * *

Sec. 7 [5 U.S.C., § 1006]:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence,

(4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a

material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8 [5 U.S.C., § 1007]:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision, or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 41—October Term, 1957.

(Argued October 9 and 10, 1957

Decided November 8, 1957.)

Docket No. 24532

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and

LUMBARD and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, *Chief Judge.* Defendant appeals from a judgment entered in favor of plaintiff for $6,550.81 (amended to include interest, counsel fees and costs to $11,502.42) after a trial before the court without a jury. The action was brought to enforce an order of the Interstate Commerce Commission awarding reparations for unreasonable freight rate charges. Affirmed.

HARRY TEICHNER, *for plaintiff-appellee.*

GERALD E. DWYER (J. Edgar McDonald on the brief), *for defendant-appellant.*

Appendix B.

MOORE, *Circuit Judge:*

This is an appeal by the defendant, The New York Central Railroad Company (referred to as the "Railroad") from a final judgment of $11,502.42 in favor of the plaintiff, the New Process Gear Corporation (referred to as "New Process") in an action to enforce an order of the Interstate Commerce Commission (referred to as the "Commission") awarding reparation to New Process in the sum of $6,550.81 for alleged overpayments on freight shipments made by New Process over the Railroad's lines from Syracuse, N. Y., to Detroit, Mich., during the period April 9, 1944 to August 21, 1947 plus interest, counsel fees and costs.

On June 8, 1950 New Process filed a complaint with the Commission which assailed the freight rates charged on carload shipments of automobile driving gear parts as unjust and unreasonable in violation of Sections 1 and 4 of the Interstate Commerce Act (49 U. S. C. A. § 1(5) and § 4).

The proceeding was heard by a Commission examiner who recommended that the Commission "should find that the rates charged have not been shown to have been unreasonable" and that the complaint should be dismissed. Exceptions were filed by New Process to the examiner's report and the matter was thereafter heard by Division 3 of the Commission. This Division rejected the report of the examiner and found that the rates charged on certain of the shipments were unreasonable and that New Process was entitled to reparation "in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable, with interest."

Thereafter the Railroad filed a petition for reconsideration, pointing out the alleged errors of the report of Division 3, which petition was denied by order of the Commission, dated May 17, 1954. Subsequently the Rail-

road sought leave to file a further petition for reopening and reconsideration, which leave was also denied by the Commission on February 7, 1955.

To enforce the Commission's order awarding reparation, New Process brought this action in the district court for the Southern District of New York (49 U. S. C. A. § 16(2)).

The complaint that the freight rates charged were unreasonable is based upon the fact that during the period of the shipments in question there existed a Commodity rate between Syracuse, N. Y., and Detroit, Mich., for the gear parts shipped by New Process of 37¢ per 100 pounds for a minimum weight of 30,000 pounds and a Class rate of 42¢ per 100 pounds subject to a minimum weight of 24,000 pounds. Both Commodity and Class rates were subsequently increased but these increases only affect the mathematics of the reparation calculations and not the principle involved.

Taking the two rates in effect between April 9, 1944 and June 30, 1946 when the Commodity and Class rates were 37¢ and 42¢ respectively, the Railroad, using the Commodity rate, would have received $111 per car for a minimum weight of 30,000 pounds and 37¢ per 100 pounds for all weights above this minimum. Likewise, based upon a Class rate calculation of 42¢ per 100 pounds, the Railroad would have received $100.80 had 24,000 pounds been loaded at the 42¢ rate. A shipment of approximately 26,430 pounds at the 42¢ rate would have equaled the $111 amount at the 37¢ Commodity rate on the 30,000-pound minimum basis. Therefore, the only area in which New Process could have benefited by the application of the 42¢ Class rate would have been on shipments under 26,430 pounds. 2,355 shipments were made during the reparation period. 1,717 were over 30,000 pounds and, therefore, subject to the Commodity rate. The judgment

is based upon the difference between the amount payable on the other 638 shipments at the 42¢ Class rate (whenever the amount would have been less than 37¢ Commodity rate applied to the 30,000-pound minimum) and the amount actually charged based on the Commodity rate.

Division 3 of the Commission in its opinion justified its conclusion of unreasonableness by saying "A class rate based on the rating of a commodity in the governing classification is ordinarily the highest rate that may be deemed reasonable for that commodity. *E. I. DuPont de Nemours & Co.* v. *Chicago, N. S. & M. R. Co.*, 258 I. C. C. 789, 794. A carload minimum weight must be considered as a part of a carload rate, and where the minimum weight in connection with a commodity rate results in higher charges than under a class rate with a lower minimum, there is a presumption of unreasonableness requiring special justification. *Butte Fruit & Produce Co.* v. *Northern Pac. Ry. Co.*, 178 I. C. C. 370; *Butler Bros.* v. *Ann Arbor R. Co.*, 253 I. C. C. 437."

The Railroad had argued that it had agreed to the 37¢, 30,000-pound minimum rate to meet motor truck competition threatened by New Process. However, Division 3 dismissed this argument peremptorily by saying "Prior agreement, however, is not determinative of the just, reasonable, and non-discriminatory character of a rate. See *Ladd & Co.* v. *Gould Southwestern Ry. Co.*, 36 I. C. C. 179, 181."

The effect of the Commission's decision is to give the shipper, New Process, alternate rates despite the fact that in certain of its decisions it had said that the establishment of alternative bases was not generally desirable, although recognizing their reasonableness in special instances. The district court gave this effect to the Commission's decision, saying "What the Commission effectually did in this case was impose an alternate rate, some-

thing it had often protested it did not require as part of a fair rate basis. *American Popcorn Company* v. *Atchison, T. & S. F. Ry. Co.*, 182 I. C. C. 230; *Vacuum Cleaner Mfrs. Ass'n. v. Atchison, T. & S. F. Ry. Co.*, 276 I. C. C. 783, 792."

The Railroad concedes, as it must (49 U. S. C. A. §16(2)), that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, namely, that the rates charged were excessive and unlawful and that the Commission has primary jurisdiction over the question of reasonableness of rates. Its real dissatisfaction with the Commission's decision stems from the rejection of the Railroad's assertion that "The publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis."

The fixing of rates and the determination of what rates are applicable are primarily functions of the Commission. Unless this Court is prepared to rule that the Commission has no power under any circumstances to recognize alternative rates in determining whether the rates charged are unreasonable, the conclusion of the Commission should be accepted (*Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490, cert. den. 290 U. S. 697). The province of the appellate court was well defined in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663, as follows: "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." Nor can this Court say as to the Commission's conclusion "that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute," *Barringer & Co.* v. *United States*, 319 U. S. 1, 6-7.

The Railroad cannot complain too seriously as a matter of equity. Two rates were published, one a Class rate and the other a Commodity rate. It accepted shipments at the lower Commodity rate for 30,000 pounds and up to avoid possible loss of its traffic to motor carriers. Its Class rate was available for shipments of 24,000 pounds and up. There was nothing in the record to indicate that New Process agreed not to ship any consignments of less than 30,000 pounds or not to take advantage of the published rate for the 24,000-pound minimum. Nor is the Railroad's argument helped by its mathematical speculations as to the savings to New Process had all the shipments been made at the Class rate because the shipper never agreed to use the Railroad's services at such a rate.

Upon appeal the Railroad, as appellant, asserts that there was no evidence before the Commission to sustain each of its findings and that it was entitled to a trial *de novo* before the district court. It also alleges error in the exclusion of evidence offered in the district court which had not been before the Commission.

The scope of review by the district court was whether there was substantial evidence supporting the findings of fact made by the Commission and whether the conclusions of the Commission were in accordance with the standards set by Congress (*United States* v. *I. C. C.*, 337 U. S. 426; *Mitchel Coal & Coke Co.* v. *Penn. R. R. Co.*, 230 U. S. 247; *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490, cert. den. 290 U. S. 697).

There was substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based. Nor was the action of the district court in striking the evidence offered by the Railroad prejudicial to it because damages on the Commission's theory could not have been computed on the over-all average theory advanced by the Railroad. The Commission specifically

limited the range of overcharge. Hypothetical Class rate charges on the 1,717 shipments could not have served as an offset to the reparation awarded.

The long-and-short haul provision of Section 4 and the reverse direction shipment presumption are not sufficiently material to be considered in any way determinative by the Commission or by the district court in reaching their conclusions. The possible inconsistency of the Commission in reaching different results in different cases is no basis for holding that the Commission must adopt one policy or the other.

The judgment below is affirmed with an attorney's fee in favor of the appellee in the sum of $1,000 as stipulated by the parties to be taxed as part of the costs upon this appeal in the event appellee prevailed.

Judgment

(Filed November 8, 1957.)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with the costs to the appellee.

Further ordered that an attorney's fee in favor of the appellee in the sum of $1,000. as stipulated by the parties be taxed as part of the costs upon the appeal.

Appendix C

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

against

THE NEW YORK CENTRAL COMPANY,

Defendant-Appellant.

PETITION FOR REHEARING

To the Circuit Court of Appeals for the Second Circuit and the Judges thereof:

Comes now the defendant-appellant in this action and, in accordance with the provisions of Rule 25(a) of the Rules of the United States Court of Appeals for the Second Circuit, respectfully submits this petition for rehearing.

In support thereof the defendant-appellant respectfully shows:

I.

The Court has failed completely to understand the applicable rate and tariff situation.

During the period from April 9, 1944 to August 21, 1947, the plaintiff-appellee made 2,355 shipments of automobile gear frame parts from Syracuse, N. Y., to Detroit, Mich. During that entire period a commodity rate of 37

cents.* Subject to a carload minimum weight of 30,000 pounds, was the only rate legally applicable on those shipments, or on any other carload shipment made by any other shipper from Syracuse to Detroit, and regardless of whether it actually weighed 20,000 pounds or 80,000 pounds.

The decision of this Court indicates unmistakably that it failed to understand the rate and tariff situation which gave rise to the complaint before the Interstate Commerce Commission.

For example, the Court speaks (p. 37) of "two rates in effect between April 9, 1944 and June 30, 1946". Again, the Court states (p. 38) that 2,355 shipments were made during the reparation period, but that only "1,717 were over 30,000 pounds, and therefore subject to the commodity rate". And again the Court states (p. 40) that the defendant-appellant "accepted shipments at the lower commodity rate for 30,000 pounds and up, and that its class rate was available for shipments of 24,000 pounds and up".

That the Court further misunderstood or misconstrued the applicable rate and tariff situation as well as the position of the defendant-appellant, is further indicated by its statement (p. 39) that "its real dissatisfaction with the Commission's decision stems from the rejection of the railroad's assertion that 'the publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis'."

Prior to October 21, 1941, the legally applicable rate was a class rate (55a). That class rate was superseded by the commodity rate which was published to become effective October 21, 1941.

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* That rate was increased to 41 cents per 100 pounds effective July 1, 1946, and to 47 cents per 100 pounds effective July 1, 1947.

Appendix C.

Section 141.7 of the Interstate Commerce Commission's Tariff Circular 20, issued June 11, 1928, as amended (49 CFR 141.7) provides as follows:

> "Where a commodity rate * * * is named in a tariff from origin to destination such commodity rate, except as otherwise provided in paragraphs (b) and (c) of this section and in Sec. 141.27, *is the applicable rate and the only rate that may be used* via the route or routes over which the commodity rate applies, even though a class rate (except as provided in Sec. 141.27), or some combination of rates may make lower." (Italics added.)

Paragraphs (b) and (c) of said section permit the publication of a provision for the "alternative use" of the commodity rate and the class rate. Section 141.27 permits the publication of a provision for the alternative application of class or commodity rates from or to intermediate points. As the Commission noted in its report, the tariff in question did not provide for the alternative application of the class and commodity rates (64a).

Thus, the only legally applicable rate on each and every one of the 2,355 shipments was the commodity rate.

II.

Because the Court failed to understand the applicable rate and tariff situation it erroneously concluded the Railroad cannot complain as a matter of equity.

At page 40 of its opinion the Court says:

> "The Railroad cannot complain too seriously as a matter of equity. There was nothing in the record to indicate that New Process agreed not to ship any consignments of less than 30,000 pounds or not to

take advantage of the published rate for the 24,000-pound minimum. Nor is the Railroad's argument helped by its mathematical speculations as to the savings to New Process had all the shipments been made at the Class rate because the shipper never agreed to use the Railroad's services at such a rate."

Section 6(7) of the Interstate Commerce Act made the collection of charges accruing under the commodity rate mandatory. So long as that tariff was effective it was to be treated as though it had been a statute, binding upon railroad and shipper alike. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197. The commodity rate was the only lawful rate and deviation from it was not permitted under any pretext. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97. No contract could reduce the amount legally applicable or release a shipper who had assumed an obligation to pay the charges, *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 264 U. S. 59, 65. Nor might equitable considerations serve to justify failure of the carrier to collect or retention by a shipper of any part of lawful tariff charges. *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478.

The only rate that the shipper "agreed" to pay or which the railroad "agreed" to assess on each and every one of the 2,355 shipments was, by virtue of Section 6(7) of the Act the legally applicable commodity rate.

The Court's conclusion (p. 40) that "the railroad cannot complain too seriously as a matter of equity" apparently results from its patent misunderstanding of the applicable rate and tariff situation, a fact indicated by its repeated assumption that one rate applied to shipments 30,000 pounds and up, and another for shipments 24,000 pounds and up. Actually one carload rate was legally applicable whether a shipment weighed 24,000 pounds, 30,000 pounds, or any other weight.

Appendix C.

The railroad was unalterably bound by the commodity rate for the period when it was in effect. On the other hand, although the shipper or consignee was bound to pay the lawful tariff charges it nevertheless was left with the right to apply to the Commission for reparation if it could factually and legally establish that the rates or charges paid were unreasonably high in violation of the provisions of the Interstate Commerce Act, and that it was damaged by reason of the alleged unlawful rate. *Penna. R. R. Co.* v. *International Coal Co., supra.*

In the instant case, the Commission held that the complainant should receive as reparation the sum of $6,550.81 on 638 shipments on the basis of a rate found by it to be a reasonable rate. Yet had that very same rate been the legally applicable rate throughout the reparation period, as the Commission in effect finds it should have been, the railroad would have received in excess of $33,000.00 as additional revenue on the remaining 1,717 shipments. If the rate was a just and reasonable one on 638 shipments, it was likewise a just and reasonable rate on the remaining 1,717 shipments. However, the railroad is left without a right at law to recoup the difference in charges that would have accrued—approximately $26,500. That an anomalous and inequitable situation results under these circumstances has, as a matter of fact, been recognized by the Commission itself, as the defendant-appellant pointed out in its reply brief at page 10.

The evidence herein shows that the commodity rate assailed by appellee before the Commission as being unreasonable was a rate which it requested the railroad to put into effect (54a). Incidentally, this evidence was not offered as being determinative of the reasonableness of the rate, as the Commission erroneously inferred in its report and to which this Court alludes at page 38 of the opinion. That evidence was offered only to show the Commission that at the request of New Process the rail-

road had substantially reduced the previously applicable 42 cent class rate by voluntarily publishing the 37 cent commodity rate in an effort to meet truck competition. But for that voluntary reduction by the railroad the class rate basis would have been legally applicable on each and every one of the 2,355 shipments, in which event New Process Gear would have been required to pay $26,500 in additional transportation charges. In other words, that commodity rate, published at the request of New Process Gear and then assailed by it as being unreasonably high, resulted in savings of approximately $26,500 in transportation charges during the reparation period alone.

Since this commodity rate was lower than the class rate which it superseded, the only instances in which lower charges could result under the superseded class rate were in connection with light-loaded shipments. The loading of the cars was within the control of appellee, and the evidence shows that it was entirely unnecessary to light-load the cars since the plaintiff was at the very same time loading other shipments as heavily as 70,000 or 80,000 pounds (56a, 57a, 58a, Exh. B). It shows that this light-loading took place during a period of war and national emergency when the Federal Government found it necessary in the public interest to issue orders designed to regulate the use of railroad equipment in order to accomplish the maximum utilization thereof (14a, 20a, 31a-33a), this evidence having been excluded by the trial court (34a).

Appellant respectfully submits that it would indeed be inequitable to award reparation to appellee on 638 shipments particularly where, as here, it was within appellee's own control to avoid the situation complained of, and where, as here, appellant is left without a right at law to recoup the sum of approximately $33,000 on the remaining 1,717 shipments.

Appendix C.

III.

The Court has misconstrued appellant's dissatisfaction with the Commission's decision.

At page 39 of the opinion it is stated:

> "* * * Its real dissatisfaction with the Commission's decision stems from the rejection of the Railroad's assertion that 'The publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis'."

It is to be seen from what has been shown heretofore in this petition that the quoted portion of the above statement is a statement of fact which the Commission has not rejected and in fact could not reject since the commodity rate was the only rate legally applicable on the involved traffic from Syracuse to Detroit, having the force and effect of a statute. If that were not so, the sought class rate basis would have been legally applicable on the shipments on which reparation is sought, and there would have been no litigation.

The real dissatisfaction of the railroad with the Commission's decision stems from the fact that a rate which resulted in a saving to appellee in transportation charges of approximately $26,500 during the reparation period alone is nevertheless found unjust and unreasonable. It is the position of the appellant that the legally applicable commodity rate was either just and reasonable in its over-all application, or it was unjust and unreasonable in its over-all application. It is its position that in determining the fact and amount of damage, the Commission should have considered the assailed rate versus the sought rate in their application to all 2,355 shipments, and not simply to 638 shipments.

Appendix C.

IV.

The Court has overlooked the important fact that the Commission's report contained no finding that complainant was entitled to alternative rates retroactively.

It is stated in the opinion, at page 39:

> "* * * Unless this Court is prepared to rule that the Commission has no power under any circumstances to recognize alternative rates in determining whether the rates charged are unreasonable, the conclusion of the Commission should be accepted."

Defendant-appellant has not contended and does not contend that the Commission has no power under any circumstances to prescribe alternative rates. On the contrary, the appellant respectfully submits to the Court that had the Commission made a finding in its report that the complainant was or was not entitled to alternative rates, this matter would not be in litigation.

The nature of the evidence which would be necessary to support a finding of alternative rates is shown by the cases which appellant has cited in its reply brief at pages 13 and 14. Those cases make it clear that alternative rates will not be prescribed if they result in a loss of revenue or a wasteful use of equipment. In the instant case, had the complainant avoided the light-loading of the cars, as it could have done, the result would have been a more efficient use of the railroad's equipment and that action would have rendered academic any question concerning alternative rates inasmuch as in all instances the commodity rate would have resulted in lower charges.

The Examiner, in his proposed report, pointed out that the "complainant, in asking for reparation, in effect seeks an alternating rate" (62a). Yet, Division 3 completely ignored that statement of what the principal issue in the

case was and decided it on an entirely different basis. Appellant respectfully submits that the action of the Commission in disregarding the question of alternative rates, which the Examiner specifically dealt with in recommending dismissal of the complaint, must be deemed to constitute a declination on its part to afford complainant a dual basis of rates retroactively. At any rate, it would be highly improper for this Court to read into the Commission's report a conclusion which is not expressly stated, a conclusion, moreover, which the Commission itself deliberately ignored or rejected.

Section 14(1) of the Interstate Commerce Act provides as follows:

> "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; *and in case damages are awarded such report shall include the findings of fact on which the award is made.*" (Italics added)

The Commission's failure to conclude that complainant was entitled to a dual basis of rates retroactively, and its failure to make findings of fact to support such a conclusion renders its report and order invalid if the only basis on which reparation can be sustained is a right to dual rates. Obviously, that is the only basis since, in the absence of a dual basis, a single rate, either the commodity rate or the class rate, must be considered in relation to all 2,355 shipments in determining whether appellant was in fact damaged. A consideration of the class rate found reasonable in connection with said 2,355 shipments forces the conclusion that complainant actually benefited from the voluntary establishment of the commodity rate alleged to be unreasonable.

Appendix C.

It is stated at page 41 of the opinion:

> "There was substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based. Nor was the action of the district court in striking the evidence offered by the Railroad prejudicial to it because damages on the Commission's theory could not have been computed on the over-all average theory advanced by the Railroad. The Commission specifically limited the range of overcharge. Hypothetical Class rate charges on the 1,717 shipments could not have served as an offset to the reparation awarded."

There is no justification for the second, third and fourth sentences in this paragraph except upon a theory that complainant was entitled to alternative rates retroactively. In fact, the opinion expressly states at page 38 that the effect of the Commission's decision is to give the complainant alternative rates. Appellant reiterates that the Commission was required to make an express finding to that effect based upon evidence of record. It did not and could not do so, and it would constitute error for this Court to assume that that was the theory upon which the case was decided.

A more serious question arises from that assumption. It is stated that there was "substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based." Is the "conclusion" referred to the "assumed conclusion" that complainant was entitled to a dual basis of rates retroactively. If so, the Commission's report points to no evidence in that respect.

It is respectfully submitted that this Court has fallen into a serious error of giving effect to evidence to support an entirely different conclusion from that reached by the Commission. There was no evidence in this record to support a conclusion that the complainant was entitled to

alternative rates retroactively, but even if there were the Commission was required to make the necessary findings of fact in its report to support that conclusion. It has not done so, and it would be entirely improper for this Court to do it on its behalf.

V.

Conclusion.

For the reasons above stated, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court and the judgment of the United States District Court, Southern District of New York, be reversed.

Dated at New York, N. Y., November 21, 1957.

Respectfully submitted,

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New York 17, N. Y.

The New York Central Railroad Company, appellant herein, by its attorney, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and in fact and proper to be filed herein.

Dated at New York, N. Y., November 21, 1957.

J. Edgar McDonald,
Attorney for Defendant-Appellant.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 41—October Term, 1957.

(Petition filed November 22, 1957

Decided January 15, 1958.)

Docket No. 24532

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,*

LUMBARD and MOORE, *Circuit Judges.*

On Petition for Rehearing.

GERALD E. DWYER, Esq., New York, N. Y. (J. Edgar McDonald, Esq., New York, N. Y., on the brief), *for petitioner-defendant-appellant, The New York Central Railroad Company.*

MOORE, *Circuit Judge*:

Defendant-appellant has petitioned for rehearing because it believes that this Court in its opinion, filed on November

8, 1957, failed to understand the applicable rate and tariff situation and that this Court assumed that a commodity rate applied to shipments of 30,000 pounds and up and a class rate applied to shipments of lesser weights. The problem before this Court was whether the district court was correct in sustaining the Commission's findings and granting judgment for reparations. The Commission had found that "the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the corresponding class-40 rates subject to the minimum of 24,000 pounds." In its petitions for modification and further hearing before the Commission appellant raised the same points now urged, namely, that the rate on the 638 carload shipments "must, in the absence of a finding of a dual or multiple basis of reasonable rates, be found equally reasonable with respect to the 1,710 other carload shipments"; that there was only one rate legally applicable, the commodity rate; and that there was no provision for the alternative application of class and commodity rates.

In deciding whether the rates charged on the 638 carloads were unreasonable, the Commission applied as a measure for reparation the amounts which would have been payable if the class rate were in effect in contrast to the amounts payable on the commodity rate basis. This Court did not assume, as appellant states in its petition, that one rate (i.e., the commodity rate) applied to shipments of 30,000 pounds and up and another rate (i.e., the class rate) to 24,000 pounds and up. Nor did this Court decide that two rates, commodity and class, were available to New Process. The Commission, however, did find in fact that the rates were unreasonably high at to 638 carloads. As the district court pointed out, the Commission's "decision appears to be something of an innovation; it condemned a commodity rate only as it applies to low weight shipments and not its overall application." Its condemnation was merely incidental

to its finding of unreasonableness which rested upon a belief that the commodity rate when applied to low weight shipments resulted in an unreasonably high per pound figure. Since such a holding was within the power and discretion of the Commission, its decision as to rates should not be disturbed unless unsupported by evidence.

The petition for a rehearing is denied.

Order

(Filed January 15, 1958.)

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 912

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

—against—

NEW PROCESS GEAR CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 912

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

—against—

NEW PROCESS GEAR CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

(1) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, is the defendant railroad entitled to a trial *de novo* by a court and jury on the administrative issue of reasonableness of rates?

(2) Do the report and order of the Interstate Commerce Commission upon which this suit is based contain the findings required by Section 14(1) of the Interstate Commerce Act?

ARGUMENT

The judgment of the Court of Appeals is correct and is not in conflict with any other decision, so as to warrant further review of the case by this Court.

1. The Defendant is not Entitled to a Trial de novo by a Court and Jury on the Administrative Issue of the Reasonableness of Rates

The petitioner seeks a pronouncement by this Court that in a suit under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, the defendant railroad is entitled to have a jury determine what a reasonable freight rate would be for the transportation services in question.

It is apparent that such thesis would be abortive of the Interstate Commerce Act and would relegate us to the era preceding the legislative creation of that statute in the year 1887. In effect the petitioner is asking this Court to promote the very vice of non-uniformity of railroad rates and practices that was sought to be eliminated by the Congress of the United States. If this Court were to subscribe to the suggestion of the petitioner, different juries could reach different results in determining the reasonableness of a rate assessed by a carrier, thus introducing veritable chaos in the world of transportation. The problem was fully discussed by this Court in *Mitchell Coal and Coke Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, and the rationale therein fully supports the doctrine that the carrier is not entitled to a trial *de novo* before a trial court on the administrative issue of the reasonableness of transportation rates.

There is no conflict in decisional law on this subject. The cases cited in petitioner's brief at page 11, do not support the petitioner's contention. In *Atchison, T. & S. F. Ry. Co.* v. *Spiller*, 246 Fed. 1, reversed 253 U. S. 117, the only question decided by the court was whether the evidence before the

Interstate Commerce Commission supported its order of separation. The Circuit Court of Appeals held that there was not sufficient evidence to support the Commission's findings and that the trial court should have dismissed the complaint. This Court reversed and held that the evidence before the Commission was sufficient to sustain its findings and affirmed the judgment of the District Court.

Likewise, the case of *Southern Ry Co. v. Etchler*, 56 F. (2d) 1010, involved merely a review of the evidence adduced before the Commission to determine whether such evidence supported its order. In *Blair v. Cleveland, C., C. & St. L. Ry. Co.*, 45 F. (2d) 792, affirmed 59 F. (2d) 478, the controversy was focused upon judicial questions as to which the parties had a right to a trial *de novo*, but not upon the administrative issue of unreasonableness of the assailed rates. In *Atlantic Coast Line R. Co. v. Smith Brothers*, 63 F. (2d) 747, Cert. denied 289 U. S. 761, and *Gabbert v. Atchison, T. & S. F. Ry. Co.*, 93 F. (2d) 562, the question of a trial *de novo* on the administrative issue of unreasonableness of rates, was not presented.

On the other hand, the question was squarely presented in the case of *Glens Falls Portland Cement Co. v. Delaware & Hudson Co., et al.*, 66 F. (2d) 490, Cert. denied 290 U. S. 697. At the trial the defendants offered expert testimony as to the reasonableness of the rates in question. An objection to such evidence was sustained. In the Circuit Court of Appeals the Court stated at page 493, that the chief question on the appeal was whether the defendants are entitled to have the jury determine the reasonableness of the rates on evidence presented to it upon the trial regardless of the evidence presented to the Commission. The Court, relying upon this Court's decision in *Mitchell Coal and Coke Company v. Pennsylvania Railroad Company, supra*, answered that question in the negative and held that neither the shipper nor the carrier may attack the administrative decision on the issue of reasonableness of the rates except on the ground that there

was no evidence before the Commission to support it. The Court denied certiorari.

The question was also directly presented in *Delaware & H. R. Corporation* v. *Penn Anthracite Mining Co.*, 91 F. (2d) 634, affirming 16 F. Supp. 732, Cert. denied 302 U. S. In the trial court the defendants offered expert testimony to the reasonableness of the rates. This evidence was excluded. The question before the Circuit Court of Appeals was whether the court erred in refusing to allow the defendants to introduce evidence in contradiction of the Commission's finding that the rates assailed were unreasonable. The court followed the *Glens Falls, supra*, case and held that the question of reasonableness cannot be made the subject of a trial *de novo*, in the courts and that the Commission's findings thereon are binding on the courts if supported by evidence before the Commission. This Court denied certiorari.

In *El Paso & S. W. R. Co.* v. *Phelps-Dodge Mercantile Co.*, 75 F. (2d) 873, the Circuit Court of Appeals considered the evidence introduced by the carrier on the trial, only on the question of the fact and amount of damage, and stated that with respect to the issue of the reasonableness of the rates the findings of the Commission are conclusive. Similarly, in *South Carolina Asparagus G. Assn.* v. *Southern Ry. Co.*, 81 F. (2d) 419, Cert. denied 290 U. S. 647, the Circuit Court of Appeals held that the Commission's administrative finding fixing the extent to which the rates charged were unreasonable, is binding upon the courts. This Court denied certiorari.

In the case of *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, this Court said at pages 440 and 441:

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard

of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

In the case *of Baltimore & Ohio Railroad Company* v. [illegible] *Coal Co.*, 215 U. S. 481, this Court, commenting on the case just cited, stated at page 494:

"Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce."

The rationale of the *Abilene* case, was recently repeated by this Court in *United States* v. *Western Pacific Railroad Company*, 282 U. S. 59, wherein it was held that the question of reasonableness of a tariff is within the exclusive primary jurisdiction of the Interstate Commerce Commission.

Following the decision rendered by this Court in *United States* v. *Western Pacific Railroad Co.*, *supra*, the United States Court of Appeals, Eighth Circuit, held in *Northwestern Auto Parts Company* v. *Chicago, Burlington & Quincy Railroad Company*, 240 F. (2d) 743, Certiorari denied, 353 U. S. 915, that questions of reasonableness of a tariff as applied are in the exclusive primary jurisdiction of the Interstate Commerce Commission.

In *Barringer & Co.* v. *U. S.*, 310 U. S. 1, 6-7, this Court applied the well settled rule that the conclusions of the Interstate Commerce Commission on administrative issues "will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute (citing cases)." This case was cited in a footnote to the opinion in the case of *United States* v. *Interstate Commerce Commission*, 352 U. S. 158, 176, wherein this Court held that an administrative issue is a question of fact for the Commission's exclusive determination.

In *Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285, 291, this Court said:

> "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

In *Dance Freight Lines* v. *United States*, 149 F. Supp. 367, the three judge District Court said at page 371:

> "The restricted function of the court in reviewing findings of the Interstate Commerce Commission, acting within the field of its designated power, has so frequently been emphasized by the decisions of the Supreme Court that it is no longer open to question."

In *General Motors Corporation v. United States*, 149 F. Supp. 838, the Court said at page 850:

> "Review by this Court of orders of the I.C.C. is limited to finding whether there was substantial evidence supporting any findings of fact made by the Commission and whether the conclusion of the Commission were in accordance with the standards set by Congress. United States v. I.C.C., 337 U. S. 426."

To like effect see *Ontario Freight Lines Corporation v. United States*, 76 F. Supp. 528, 529; *Seaboard Air Line R. Co. v. United States*, 131 F. Supp. 123, affirmed 349 U. S. 902; *Cleveland Electric Illuminating Co. v. United States*, 167 F. Supp. 622, 630; *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541; *Illinois Central R.R. Co. v. Interstate Commerce Commission*, 206 U. S. 441.

On page 6 of its petition, the petitioner states that the trial court extended the doctrine of the *Glens Falls, supra*, case to include the Commission's findings of the fact and amount of damage as being conclusive and binding upon the court. We believe the petitioner is in error inasmuch as there is nothing in the opinion and judgment of the trial court to warrant the petitioner's statement.

We respectfully submit that the court below correctly decided that the trial court properly limited its consideration of the reasonableness of the assailed rates to a determination as to whether there was evidence before the Commission to sustain its findings on that issue.

settled principle of law that the Commission is not bound by the doctrine of *stare decisis* and that it may consider each case before it upon the evidence adduced therein, and so long as its decision in a particular case is supported by the evidence, it matters not that a contrary conclusion was reached by it in another similar case. The Courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. E.g., *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Western Paper Makers Chemical Co.* v. *United States*, 271 U. S. 268, 271.

This Court said in *Virginian Ry. Co.* v. *United States*, *supra*, at page 663:

> "To consider the weight of evidence before the Commission, the soundness of its reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, AND AN ADDITIONAL COUNSEL FEE SHOULD BE ALLOWED TO THE RESPONDENT FOR SERVICES COVERING THIS PROCEEDING IN PURSUANCE OF SECTION 16(2) OF THE INTERSTATE COMMERCE ACT.

Respectfully submitted,

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April 21, 1958.